IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NICOLAS REYES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 3:18-cv-0611
	)	
HAROLD CLARKE, et al.,	)	
	)	
Defendants.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER VENUE

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PRELIMINARY STATEMENT

This case is about the policies and practices of the Defendants that have resulted in the Plaintiff, Mr. Nicolas Reyes, being held in near endless isolation for over twelve years. In support of their Motion to Transfer Venue, the Defendants contend that this case should be transferred to the Western District of Virginia on a variety of unsubstantiated grounds. These proffered grounds for transfer, discussed more fully below, are based on exaggerated or unsupported assertions or suggestions, including that: (1) "all materials pertinent to this action are located in the Western District" (Defs.' Mem. 1 (emphasis added)); (2) Defendant might need 110 trial witnesses, leaving Red Onion "half-emptied to supply necessary fact witnesses for trial" (*id.* at 13); (3) jurors in the Eastern District would have "little, if any, interest" in this Step-Down Program (*id*. at 16), even though it was devised, publicly-praised and managed (to this day) out of Richmond; and (4) it would even inure to Mr. Reyes' "convenience" if this case were transferred, since he then could return "in the evenings" of trial (*id*. at 14) to the solitary cell he seeks to be immediately removed from through this lawsuit.

Because the Defendants' motion lacks factual support and ignores substantial amounts of the Plaintiff's allegations (all of which are taken as true for purposes of this motion), Defendants have fallen far short of their burden under 28 U.S.C. § 1404 and the case law construing it. Plaintiff therefore respectfully requests that this motion be summarily denied.

STANDARDS

Under 28 U.S.C. § 1404(a), "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." Section 1404(a) grants the District Court discretion to "adjudicate motions for

transfer according to an 'individualized, case-by-case consideration of convenience and fairness.'" *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964)).[1] The moving parties bear the burden of proving that the facts warrant a transfer of venue. *Samsung Elecs. Co. v. Rambus Inc.*, 386 F. Supp. 2d 708, 715 (E.D. Va. 2005); *see also Cognitronics Imaging Sys., Inc. v. Recognition Research Inc.*, 83 F. Supp. 2d 689, 696 (E.D. Va. 2000). "On a motion to transfer, the facts as alleged in the complaint are accepted as true and all reasonable inferences are drawn in the plaintiff's favor." *Invue Sec. Prods. Inc. v. Mobile Tech, Inc.*, 3:15-cv-00610-MOC-DSC, 2017 WL 3595486, at *2 (W.D.N.C. Aug. 21, 2017).[2] And the decision of whether to transfer a case is committed to the sound discretion of this Court. *Stewart Org.*, 487 U.S. at 29–30.

"District courts within this circuit consider four factors when deciding whether to transfer venue: (1) the weight accorded to Plaintiff's choice of venue; (2) witness convenience and

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[1] Plaintiff agrees with the Defendants (Defs.' Mem. 9) and the parties do not dispute that venue would be proper in the Western District of Virginia for purposes of the first prong of section 1404(a).

[2] *See also Dearbury Oil & Gas, Inc. v. Lykins Cos.*, Civil Action No. 7:16-0923-MGL, 2017 WL 713689, at *2 (D.S.C. Feb. 23, 2017) ("When presented a motion to transfer, other courts in the Fourth Circuit have accepted the factual allegations in the plaintiff's complaint as true. The Court agrees with that approach and will thus do likewise." (citing *Celgard, LLC v. LG Chem, Ltd.*, No. 3:14-cv-00043-MOC-DCK, 2015 WL 2412467, at *6 (W.D.N.C. May 21, 2015))); *Century Furniture, LLC v. C & C Imps., Inc.*, No. 1:07cv179, 2007 WL 2712955, at *2 (W.D.N.C. Sept. 14, 2007); *Brooks-Williams v. Keybank, Nat'l Ass'n*, Civil No. WDQ-15-559, 2015 WL 9255327, at *1 n.4 (D. Md. Dec. 17, 2015) ("In reviewing a motion to transfer, the Court may consider evidence outside the pleadings. However, [plaintiff]'s factual allegations are accepted as true and all reasonable inferences are drawn in her favor." (citing *Ancient Sun Nutrition, Inc. v. Or. Algae, LLC*, No. 1:10CV140, 2010 WL 3719503, at *1 (W.D.N.C. Sept. 17, 2010))); *Tharpe v. Lawidjaja*, Civil Action No. 6:12-CV-00039, 2012 WL 5336208, at *1 (W.D. Va. Oct. 26, 2012).

access; (3) convenience of the parties; and (4) the interest of justice." *Trs. of the Plumbers & Pipefitters Nat'l Pension Fund v. Plumbing Servs., Inc.*, 791 F.3d 436 (4th Cir. 2015); *Bd. of Trs., Sheet Metal Workers Nat'l Fund v. Baylor Heating & Air Conditioning, Inc.*, 702 F. Supp. 1253, 1255–56 (E.D. Va. 1988) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947)).

I. The Weight Accorded to Plaintiff's Choice of Forum Favors this District.

With respect to the first factor, a Plaintiff's "choice of venue is entitled to substantial weight in determining whether transfer is appropriate." *Bd. of Trs. v. Sullivant Ave. Props., LLC*, 508 F. Supp. 2d 473, 477 (E.D. Va. 2007). "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Symbology Innovations LLC v. Lego Sys., Inc.*, 282 F. Supp. 3d 916 (E.D. Va. 2017) (alteration in original) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). Further, this Court has noted that if (as Defendants suggest here) the

> [P]laintiff's choice of forum is neither the nucleus of operative facts, nor the plaintiff's home forum, the plaintiff's choice is accorded less weight. But, even then, the plaintiff's choice of forum is certainly a relevant consideration so long as there is a connection between the forum and the plaintiff's claim that reasonably and logically supports the plaintiff's decision to bring the case in the chosen forum.

Samsung Elecs. Co. v. Rambus Inc., 386 F. Supp. 2d 708, 716 (E.D. Va. 2005) (emphasis added) (citing *Intranexus, Inc. v. Siemens Med. Solutions Health Servs. Corp.*, 227 F. Supp. 2d 581, 583 (E.D. Va. 2002)). [3]

[3] *See also Samsung Elecs. Co. v. Rambus Inc.*, 386 F. Supp. 2d 708, 717 (E.D. Va. 2005) (where plaintiff's choice of forum was not in its principal place of business, but the forum had a factual nexus to the claims, plaintiff's "choice of forum will be respected as legitimate and will be considered in striking the balance respecting transfer").

Here Plaintiff's allegations articulate numerous and substantial connections between this District and his claims that more than "logically support" his legitimate decision to bring his suit in the Eastern District of Virginia. As Plaintiff already outlined in response to Defendants' Rule 12(b)(3) motion practice, Mr. Reyes' constitutional and statutory claims arise in significant part from the acts and omissions of specific Defendants in Richmond who have implemented (and continue to implement) the policies and procedures designed in Richmond that are central to this litigation. (Pl.'s Opp'n 3–7, ECF No. 32.) The Eastern District is where the Step-Down Program was conceived and implemented, and from where it is currently overseen without sufficient safeguards for prisoners like Mr. Reyes, with English language limitations and mental health impairments. And the Eastern District is where the acts or omissions of a number of Defendants—painstakingly detailed in Plaintiff's Complaint—have kept Mr. Reyes from progressing out of solitary confinement.

Consider Richmond-based Defendant Harold Clarke. In praising the Step-Down Program, which is a key focus of Mr. Reyes' Complaint (*see, e.g.*, Compl. ¶¶ 4–5, 58–65, 73, 75–77), Virginia Governor Ralph Northam made note of that program's creation and administration "[u]nder the leadership" of Richmond-based Defendant Clarke. *See* Press Release, VDOC, Virginia Stands Out for Operating a Corrections System Without the Use of Solitary Confinement (May 10, 2018), https://www.vadoc.virginia.gov/news/press-releases/18may10_restrictivehousing.shtm.

More pointedly, less than six months ago, in a letter penned by Virginia's Secretary of Public Safety and Homeland Security, Secretary Brian Moran publicly explained to the Washington Post in precise detail (contrary to the assertions in Defendants' pending motion) the hands-on, transformative influence Defendant Clarke (based in Richmond) had on Virginia's

prisons generally and on Red Onion State Prison ("ROSP") specifically. Mr. Moran publicly touted (among other things) the following points in his Washington Post submission: (1) "under the leadership of Director Harold W. Clarke, the Virginia Department of Corrections initiated a multiyear transformation and has since undergone a wholesale culture change"; (2) "[t]he culture change within the Virginia Department of Corrections began at Red Onion, Virginia's highest-security prison"; (3) "[t]here was concern among staff when Clarke decided to transform Red Onion"; (4) Clarke "created a healing environment within the Virginia Department of Corrections by instilling a culture in staff and offenders alike that motivates them to create and foster positive and progressive changes"; and (6) "[w]ith support from the governor and legislature [in Richmond], the Virginia Department of Corrections removed all seriously mentally ill offenders from restrictive housing."[4] Brian J. Moran, Opinion, *Virginia's Corrections System is a Model for Other States*, Washington Post (June 15, 2018) (emphasis added).

These self-congratulatory admissions about Defendant Clarke's hands-on transformation of ROSP cannot be reconciled with Defendants' statements to this Court that "the Eastern District of Virginia bears little or no connection to the facts underlying this lawsuit." (Defs.' Mem. 11.) Mr. Moran's public praise of Defendant Clarke, focusing on Mr. Clarke's "transformation" of Red Onion (from his Richmond headquarters), flatly contradicts the Complaint as well as Defendants' apparent suggestion that the Step-Down policy was merely

[4] Mr. Reyes was in solitary confinement while suffering from serious mental illness at the same time that Mr. Moran made the assertion set forth in Point 6 above to the Washington Post.

"physically signed" in Richmond with no further activities emanating out of Richmond. (Defs.' Mem. 12.) (*See, e.g.*, Compl. ¶¶ 165, 168–69.)

Consider also Defendant Mathena, who works and resides in the Eastern District of Virginia. Mr. Mathena is a critical witness who may well need to spend a full day (or more) on the stand at any trial in this matter, as he wore multiple "hats" concerning matters that are highly relevant and material to Mr. Reyes' claims. First, he was the warden of ROSP for more than three years (completely overlapping with Mr. Reyes' presence at ROSP during those years, including during the initial implementation of the Step-Down Program) and can undoubtedly speak with high-level authority about the precise conditions to which Mr. Reyes was subjected there, including any and all of the Virginia Department of Correction's ("VDOC"'s) claimed reasons for its continuous incarceration of this mentally ill man in solitary confinement[5] for 12+ years and counting. Second, since 2015 he has been employed in this District, in Richmond, serving as the Security Operations Manager for the VDOC and as Chairman of the External Review Team ("ERT"). (Compl. ¶¶ 21, 182.) The ERT is the highest-level authority charged with reclassifying solitary confinement prisoners—including Mr. Reyes—to lower security. (*Id.* ¶¶ 80, 182.) As its name suggests, the ERT is an External Review Team, comprised of members

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[5] Defendants appear to avoid intentionally using the phrase "solitary confinement," instead resorting to "segregation" or "restrictive housing" throughout their memorandum. But the United States Supreme Court has had no trouble using and comprehending the phrase "solitary confinement" for over 125 years. *In re Medley*, 134 U.S. 160, 171 (1890) (referring to "solitary confinement" as "an additional punishment of the most important and painful character"); *Hutto v. Finney*, 437 U.S. 678, 686 n.8 (1978) (recognizing "solitary confinement" as a punishment subject to Eighth Amendment standards); *Apodaca v. Raemisch*, Nos. 17-1284, 17-1289 (U.S. Oct. 9, 2018) (statement of Sotomayor, J.) (recognizing "'administrative segregation' . . . is also fairly known by its less euphemistic name: solitary confinement").

external to Red Onion. Defendant Mathena chairs the ERT from his office at VDOC headquarters in Richmond. (*Id.* ¶¶ 21, 182.)[6] Mr. Mathena should be required to explain, to a local jury of his peers, why in Pound, Virginia (as Warden) and in Richmond (as ERT Chair) he has refused to allow Mr. Reyes to leave solitary confinement despite the Plaintiff's obvious, serious mental illness and the lack of penological justification for his ongoing isolation.[7]

Mr. Mathena has had the opportunity not once, but twice each year, to oversee reviews of each prisoner—including Mr. Reyes—to determine if the prisoner should be moved out of solitary confinement. (Compl. ¶ 182.) Despite Mr. Mathena's responsibility as Chairman of ERT, that body did not provide meaningful oversight of the Institutional Classification Authority's ("ICA") segregation retention decisions for Mr. Reyes, and therefore Mr. Reyes remains in solitary confinement to this day. (*Id.* ¶¶ 88–89, 182.) These are critical facts to Mr. Reyes' claims and cannot be squared with the Defendants' breezy assertion that "this cause of action overwhelmingly arose in the Western District." (Defs.' Mem. 12.) In short, the

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[6] The acts and omissions of the ERT are directly at issue in this case and give rise to Mr. Reyes' claims: Compl. ¶ 89 ("Mr. Reyes does not meet the criteria for a Level S (i.e. long-term segregation classification) or SM offender, and yet the ERT and Defendant Mathena, the Chairman of the ERT, have not returned him to general population."); *id.* ¶ 182 ("Mr. Reyes remains in solitary confinement due to Defendant Mathena's failure to perform a meaningful review of the necessity of Mr. Reyes' continued isolation.").

[7] *See* Compl. ¶ 134 ("Mr. Reyes was twice placed on suicide precautions and exhibited unusual and bizarre behavior . . . A mental health note from June 2002 reflects that Mr. Reyes' condition necessitated psychotropic medication"); *id.* ¶ 137 (in 2007 Mr. Reyes "evidenced clear indicators of psychosis (making bizarre references to President Bush, the police and making wide, arching military type salutes."); *id.* ¶ 140 (mental health professional examined Mr. Reyes in 2009 and "ascertained that Mr. Reyes was delusional and likely in need of acute treatment"); *id.* ¶ 150 (in 2018, Mr. Reyes was diagnosed with major depression, severe recurrent, and a mental disorder that was an extreme impairment to functioning).

Richmond-based defendants were authority figures with actual power to correct Mr. Reyes' unconstitutional conditions of confinement through direct orders to ROSP's employees (not the other way around). But in their Memorandum, Defendants ignore all of these allegations about the Richmond-based Defendants and apparently hope that this Court will ignore them too.

Beyond these critical, named Defendants, Plaintiff also described in his opposition to Defendants' 12(b)(3) motion the similarly important roles the other Richmond-based defendants have played. (Pl.'s Opp'n 5–6, ECF No. 32.) Defendant Robinson was responsible for approving VDOC's long-term segregation policy and overseeing its implementation, allowing the creation and perpetuation of policies that completely omitted adequate safeguards for prisoners with Mr. Reyes' limitations to progress out of solitary. (Compl. ¶¶ 170, 172.) Defendants make no mention of this allegation in their papers. And Defendant Herrick, the Director of Health Services at VDOC, was responsible for ensuring that all Red Onion prisoners had adequate access to health services. (*Id.* ¶ 190.) Despite these important responsibilities, Mr. Herrick inexplicably failed to institute a policy requiring use of interpretation services in mental health exams, directly causing Mr. Reyes to continue to suffer in solitary with declining mental health. (*Id.*)

The acts and omissions of these Defendants are related directly to the failures of the policies and procedures designed in and implemented from this judicial district. Specifically, the Complaint challenges the VDOC Step-Down Program (*id.* ¶¶ 58–62), and how Mr. Reyes was effectively "unable to participate" in the program—which Defendant Mathena stated inmates "must participate in" to get out of segregation (*id*. ¶ 60)—because Mr. Reyes does not speak English. (*Id*. ¶ 64.) Similarly, the periodic ICA segregation reviews do not allow for meaningful participation from Mr. Reyes as a result of that language barrier. (*Id*. ¶¶ 77–91.) If Defendants

want to brag about reforms to VDOC's treatment of prisoners at ROSP that emanated from Richmond with the public support and backing of the legislature and governor in Richmond, they should not be allowed to escape accountability for their actions here in Richmond—in the Eastern District of Virginia.[8]

II. Witness Convenience and Access Favors this District.

The party asserting inconvenience to its witnesses has the burden to present "sufficient detail respecting the witnesses and their potential testimony to enable the court to assess the materiality of evidence and the degree of inconvenience." *Samsung Elecs. Co. v. Rambus Inc.*, 386 F. Supp. 2d 708, 718 (E.D. Va. 2005) (quoting *Koh v. Microtek Int'l, Inc.*, 250 F. Supp. 2d 627, 636 (E.D. Va. 2003); *accord Bluestone Innovations, LLC v. LG Elecs., Inc.*, 940 F. Supp. 2d 310, 317 (E.D. Va. 2013). This Court elaborated on this burden as follows:

> Determination of a motion to transfer venue necessitates weighing the convenience to the parties and witnesses in litigating in either venue. *Acterna,* 129 F. Supp. 2d at 939. The party asserting witness inconvenience has the burden to proffer, by affidavit or otherwise, sufficient details respecting the witnesses and their potential testimony to enable the court to assess the materiality of evidence and the degree of inconvenience. *Corry,* 16 F. Supp. 2d at 667 n. 16. [Moreover,]
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> "Witness convenience is often dispositive in transfer decisions. But the influence of this factor cannot be assessed in the absence of reliable information identifying the witnesses involved and specifically describing their testimony. This type of particularized information, typically submitted in affidavit form, is necessary to enable the court to ascertain how much weight to give a claim of

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[8] Defendants' citation to the unpublished decision in *Roberts v. Morchower*, 956 F.2d 1163 (4th Cir. 1992) (per curiam) (unpublished table decision), actually supports Mr. Reyes here, because the court recognized that the presumption of venue in a prisoner's pre-incarceration domicile may be rebutted by an inmate's intention to change domicile; Plaintiff would gladly move to a secure hospital in this District given the chance and would change his domicile here in a heartbeat under those circumstances.

> inconvenience. Inconvenience to a witness whose testimony is cumulative is not entitled to greater weight. By contrast, greater weight should be accorded inconvenience to witnesses whose testimony is central to a claim and whose credibility is also likely to be an important issue."[9]

The Defendants have provided no particularized information whatsoever, in affidavit form or otherwise, to give this Court any specific events or topics that each of the alleged 100+ witnesses supposedly would need to testify about concerning Mr. Reyes' claims. Under the standards followed in this District, the Defendants have fallen short of their burden and have given this Court no basis at all upon which to meaningfully analyze the materiality of evidence and the degree of inconvenience.[10] Defendants invite the Court to make a ruling on witness convenience without knowing who might be called or the materiality of that testimony. *See Samsung Elecs.*, 386 F. Supp. 2d at 720. This factor therefore cannot support Defendants' venue change request.[11]

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9 *Koh v. Microtek Int'l, Inc.*, 250 F. Supp. 2d 627, 636 (E.D. Va. 2003) (quoting *Bd. of Trs., Sheet Metal Workers Nat'l Fund v. Baylor Heating & Air Conditioning, Inc.*, 702 F. Supp. 1253, 1258 (E.D. Va. 1988)) (emphasis added).

10 *Elec. Sys. Protection, Inc. v. Innovolt, Inc.*, No. 5:09-CV-464-FL, 2010 WL 2813503, at *2 (E.D.N.C. July 14, 2010) ("Witness convenience . . . may not be assessed without reliable information identifying the witnesses involved and specifically describing their testimony." (quoting *Bd. of Tr. v. Sullivant Ave. Props., LLC*, 508 F. Supp. 2d 473, 477 (E.D. Va. 2007))); *Div. Access Control, Inc. v. Landrum*, Civil Action No. 3:06dv414, 2007 WL 1238607, at *7 (E.D. Va. Apr. 27, 2007) ("[Defendant] has offered no proof respecting the identity of proposed witnesses or what they would say. Conclusory statements respecting convenience are insufficient to carry [defendant's] burden of proof."); *see also Byerson v. Equifax Info. Servs., LLC*, 467 F. Supp. 2d 627, 634 (E.D. Va. 2006); *Sullivant Ave. Props., LLC*, 508 F. Supp. 2d at 477; *JTH Tax, Inc. v. Lee*, 482 F. Supp. 2d 731, 737 (E.D. Va. 2007).

11 Defendants argue that the transport of other prisoner witnesses, if needed, from ROSP to this District "would also present logistical issues." (Defs.' Mem. 7 (quoting *Kiser AFF* ¶ 13.)) This is purely speculative, as neither party has yet identified a single inmate *(cont'd)*

Defendants' list of 110 potential witnesses is literally incredible. Indeed, Defendants concede that "not all of these individuals, certainly, would ultimately be called to testify at trial." (Defs.' Mem. 4 n.3.) As this Court has noted on more than one occasion, "[w]itness convenience is 'not merely a battle of numbers favoring the party that can provide the longest list of witnesses it plans to call." *Samsung Elecs.*, 386 F. Supp. 2d at 718–19 (quoting *Anderson v. Century Prods. Co.*, 943 F. Supp. 137, 149 (D.N.H. 1996)).[12] And yet, that is Defendants' primary argument in support of their motion.

Defendants' exaggerated suggestions about the potential disruption to ROSP of witnesses being forced to travel "en masse" to this District, leaving ROSP "half-emptied," are similarly incredible. (Defs.' Mem. 12–13.) Accepting this hyperbole at face value, no rational person would reasonably expect Defendants to need 100 witnesses summoned to this Courthouse all at the same time and then to wait together in an overflow witness room (or gymnasium), while ROSP collapsed behind them. Numerous practical measures surely could be worked out by counsel to address Defendants' parade of horribles, including: (1) use of video depositions, (2) alternating appearances of experts witnesses and ROSP fact witnesses to permit an efficient

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witness (other than Mr. Reyes) who would be needed to testify in person at a trial in this District. Even assuming that prisoner witnesses other than Mr. Reyes will be called, there is no way to know where in VDOC those witnesses will be housed by the time the case goes to trial.

[12] With respect to Defendants' argument that the Western District is the better venue because jurors there could more easily visit ROSP (Defs.' Mem. 13), Plaintiff notes that he is working toward the retention of an expert who will be able to demonstrate in the well of the courtroom (should this Court approve it) a true rendering of the precise contours of Mr. Reyes' cell as well as any other room or cell at issue in a trial of this case, using a state-of-the-art digital (laser-based) technology system.

staggering of fact witness schedules, (3) interposition of the Richmond-based defendants[13] with non-Richmond-based witnesses to permit efficient travel for all, (4) use of stipulations and other forms of agreed facts, and (5) any other reasonable measures this Court naturally would expect counsel to cooperate on for purposes of trial in this District. Defendants' papers do not even attempt to consider these sorts of eminently reasonable accommodations to witnesses.

Defendants also fail to anticipate the burden that Plaintiff's witnesses would experience if this case were moved out of this District. For example, Mr. Reyes' sister, who lives in Alexandria, Virginia (less than a two-hour drive to this courthouse) appears willing to testify on her brother's behalf but would face more out-of-pocket expenses if this case were tried in the Western District. (*See* Agraharkar Decl. ¶¶ 5–7.) Unlike Defendants' witnesses, who as employees of VDOC would travel to and attend trial as part of their employment and would not suffer any loss of compensation or expend personal expense, Mr. Reyes' sister will not be reimbursed for her travel to and from trial. Moreover, two mental health professionals, Dr. Stuart Grassian and Dr. Michael Alpert, have already examined Mr. Reyes at his counsel's request, and will likely testify at trial. Dr. Grassian is one of the foremost experts on solitary confinement, has studied this topic for decades, and his work on the subject has been cited by a member of the Supreme Court. *See Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring). (*See* Agraharkar Decl. ¶ 9 & Grassian CV (Ex. A attached thereto).) Dr. Alpert is fluent in Spanish and has done psychiatric evaluations of asylum-seekers in Spanish, as well as evaluations of Argentinian prisoners. (*See* Agraharkar Decl. ¶ 9 & Alpert CV (Ex. B attached

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[13] As described above, Plaintiff would reasonably expect Mr. Mathena to be a leading witness for Plaintiff, on the stand for at least a day, giving other witnesses ample time to adjust their travel schedules appropriately.

thereto).) Counsel carefully selected these mental health examiners due to their expertise and unique qualifications, which is why they were asked to evaluate Mr. Reyes despite being located out of state in the Boston, Massachusetts area. Plaintiff's likely mental health expert witnesses (with patients scheduled for treatment in Boston) could much more readily attend trial in this District and be able to return quickly to their patients as compared to this case being tried in the Western District of Virginia.

Counsel for Mr. Reyes have also consulted with and expect to call a correctional expert with highly relevant experience reducing solitary confinement populations without sacrificing safety and security. (Agraharkar Decl. ¶ 11.) That individual hails from Washington state, where he previously worked as a high-ranking correctional official. It would be considerably more difficult for him to travel in and out of the Western District for trial, given that the Richmond courthouse has a nearby major airport allowing for more flight options and less difficult connections.

In its opposition to Defendants' 12(b)(3) motion, Plaintiff has already offered to travel to Wise County, Virginia at counsel's expense to take depositions as needed of witnesses located there. (Pl.'s Opp'n 1 n.1, ECF No. 32.) Defendants ignore this offer in their papers. Where necessary to avoid real hardship, it may also be possible to use such video deposition testimony at trial, saving them a later trip to the Eastern District of Virginia.[14]

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[14] *See Samsung Elecs. Co. v. Rambus Inc.*, 386 F. Supp. 2d 708, 719 (E.D. Va. 2005) ("Although live testimony is the preferred mode of presenting evidence . . . videotaped depositions often are sufficient. Somewhat less weight is given to witness inconvenience when a party is unable to demonstrate with any particularity that videotaped deposition testimony will be inadequate, and that live testimony is critical."). Courts routinely discount arguments about witness travel inconvenience when video testimony can be *(cont'd)*

III. Convenience of the Parties Favors this District.

This prong overlaps in considerable part with the issues discussed in the preceding section. Under this heading, Defendants make three basic arguments: (1) the majority of the Defendants live near the Western District, (2) Mr. Reyes should consider it a "convenience" to be able to return to his solitary cell each night of trial, and (3) lawyer convenience is irrelevant.

With respect to the first point, seven of the seventeen Defendants live outside of the Western District of Virginia. (Defs.' Mem. 6, ¶ 9.) The Defendants based in Richmond will likely testify longer on the stand compared to the Defendants nearer the prison, since the conditions of Mr. Reyes' confinement and his admittedly poor mental health will be less contentious than the issues about why the Richmond-based Defendants pressed and applied their

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> available. *Truk Int'l Fund, LP v. Wehlmann*, No. 08 Civ. 8462 (PGG), 2009 WL 1456650, at *6 (S.D.N.Y. May 20, 2009) ("Defendants have not explained why depositions could not be used as a substitute for live testimony."); *Fujitsu Ltd. v. Netgear, Inc.*, No. 07-cv-710-bbc, 2008 WL 2540602, at *3 (W.D. Wis. Apr. 4, 2008) ("The testimony of the witnesses from third-part defendants, Atheros Communication, Inc. and Marvell Semiconductor, Inc., can be recorded by videotape depositions that can be used at trial."); *Candela Corp. v. Palomar Med. Techs., Inc.*, No. 9:06-CV-277, 2007 WL 738615, at *5 (E.D. Tex. Feb. 22, 2007) ("With modern video deposition technology, the need for many witnesses to travel at all is reduced or eliminated. This is especially true for witnesses whose credibility cannot seriously be challenged, even if there is a dispute over the effect of some technical data they produce, or a witness with background information needed to establish a basis for more crucial testimony by an expert . . . . Given this reduced need for travel, the court concludes this factor does not weigh in favor of transfer, and is, at most, neutral."); *Erb. v. Roadway Express, Inc.*, No. 4:05-CV-0011, 2005 WL 1215955, at *4 (M.D. Pa. Apr. 19, 2005) (technological "alternatives [to live testimony] substantially lessen the inconvenience to potential witnesses" and therefore lessen the consideration given to that factor); *Citibank, N.A. v. Affinity Processing Corp.*, 248 F. Supp. 2d 172, 178 (E.D.N.Y. 2003) (the court did not find the inconvenience of the witnesses significant, even though many of the defendant's former employees might not come voluntarily to the current forum, due to "the option of videotaping the testimony of witnesses unwilling to travel").

"award-winning" policies to the severe detriment of Mr. Reyes. The second point ignores the crux of Mr. Reyes' complaint: the entire thrust of Mr. Reyes' requested relief is to get out of solitary; it would by no stretch be a "convenience" for him to return every night of trial to the location of his unconstitutional confinement. But on the third point, the parties are in complete agreement: counsel does not rely on lawyer convenience to oppose this motion.

IV. The Interest of Justice Favors this District.

Under Section 1404(a), the Court must consider the "interest of justice" in determining whether to transfer venue. The interest of justice encompasses public interest factors aimed at "systemic integrity and fairness." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 30 (1988); *see also Brock v. Entre Comput. Centers, Inc.*, 933 F.2d 1253, 1258 (4th Cir. 1991). Judicial economy and the avoidance of inconsistent judgments are prominent among the principal elements of systemic integrity. *See U.S. Ship Mgmt., Inc. v. Maersk Line, Ltd.*, 357 F. Supp. 2d 924, 937–38 (E.D. Va. 2005). Systemic integrity, however, must also necessarily take account of a party's attempt to game the federal courts through forum manipulation. *See Holmes Grp., Inc. v. Hamilton Beach/Proctor Silex, Inc.*, 249 F. Supp. 2d 12, 15 (D. Mass. 2002). Fairness also requires consideration of "docket congestion, interest in having local controversies decided at home, knowledge of applicable law, unfairness in burdening forum citizens with jury duty, and interest in avoiding unnecessary conflicts of law." *Byerson v. Equifax Info. Servs., LLC*, 467 F. Supp. 2d 627, 635 (E.D. Va. 2006).

Plaintiff does not believe that inconsistent judgments are a risk here. Nor does it appear that anyone is trying to game the federal courts. To the extent Defendants suggest that the Western District is already familiar with the sorts of constitutional and statutory issues pressed by Mr. Reyes, the short answer is, this District is familiar with those issues too. *Macronix Int'l*

Co. v. Spansion Inc., Civil Action No. 3:13cv679, 2014 WL 934521, at *7 (E.D. Va. Mar. 10, 2014) (for venue purposes "federal courts are presumed to possess equal expertise in matters of federal law").[15]

Defendants also contend half-heartedly that jurors in this District would have little if any interest in seeing how their state tax dollars are spent on the Step Down Program by their neighbors in this District (i.e., the Richmond-based, high-ranking Defendants). Respectfully, it is more reasonable that local jurors would have an interest in those expenditures, particularly since the jurors in this District funded these activities with their state tax dollars, and the conduct of these Defendants enjoyed the very public support of the governor and the legislature here in Richmond as well. And to the Defendants' argument that jurors in the Western District should want to adjudge the Defendants who reside in the Western District, the same can be said of jurors here, who will plainly want to adjudge the conduct of the Defendants who reside here with equal interest.[16]

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[15] *See also Porter v. Clarke*, 290 F. Supp. 3d 518 (E.D. Va. 2018), *appeal docketed*, No. 18-6257 (4th Cir. Mar. 15, 2018) (action against VDOC defendants alleging constitutional violations arising from solitary confinement conditions for death row inmates); *Cosner v. Saum*, No. 1:12cv964 (LMB/JFA), 2013 WL 1736779 (E.D. Va. Apr. 19, 2013) (civil rights action by VDOC prisoner after having food and water withheld as punishment); *Hill v. Hutto*, 537 F. Supp. 1185 (E.D. Va. 1982) (action by VDOC prisoner challenging conditions of confinement of state prisoners in city jail including crowding, low recreation levels, and low levels of counseling); *Sellers v. Roper*, 554 F. Supp. 202 (E.D. Va. 1982) (civil rights action by VDOC prisoner that correction officer battered him, that he was improperly committed to isolation, and that he had been improperly denied prisoner privileges).

[16] Moreover, a significant amount of Virginia tax dollars was earned and expended by the Richmond-based Defendants, further supporting the local interest in this case. For example, Defendant Clarke's annual compensation of $156,060 in 2016–2017 is several times greater than the median compensation paid to rank-and-file Department of

(cont'd)

The interest of justice favors this District for additional reasons as well. The Eastern District includes the large metropolitan cities of Norfolk, Richmond, and Virginia Beach. These cities are the top three localities where VDOC prisoners are sentenced, and it is likely where they will return after completing their sentences.[17] Once sentenced, VDOC prisoners can be sent to any facility within the system. If VDOC relegates them to long-term solitary confinement for in-prison conduct, the only facilities where they could be sent are Wallens Ridge and ROSP. Contrary to VDOC's argument, it is precisely jurors from the Eastern District, where these prisoners maintain family relationships and communities, that therefore have the strongest interest in providing oversight of VDOC facilities, including ROSP. And to the extent this Court wishes to consider local interests as codified in state law, the preferred venue for challenges against state officials under state law is the county or city where such person has his official office. Va. Code § 8.01-261(2).

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Corrections workers (including those at ROSP) during those same years. *See* Richmond Times-Dispatch, *2016–17 State of Virginia Salaries, Dep't of Corrections*, http://data.richmond.com/salaries/2016/state/department-of-corrections/harold-clarke. In like fashion, Defendant Randall Mathena's annual compensation for 2016–2017 was listed as $107,549, more than triple that of the median compensation for the average corrections employee. *See* NBC29.com, *Virginia Department of Corrections Dealing with Vacancies* (June 21, 2017, 4:56 PM), http://www.nbc29.com/story/35719364/virginia-department-of-corrections-dealing-with-vacancies (reporting that the Virginia Corrections Department was "having a tough time retaining corrections and probation officers because of the compensation"). With all due respect to the Defendants, the jurors of this District surely have a substantial interest in seeing how these highly compensated, Richmond-based defendants spent Virginia state tax dollars on each and every one of their activities alleged in the Complaint.

[17] Va. Dep't of Corrections, *Judicial Mapping Project* 37–39 (Jan. 2016), https://vadoc.virginia.gov/about/facts/research/Judicial%20Mapping%20Project%20January%202016.pdf

Finally, the Defendants' opening assertion that "all materials pertinent to this action are located in the Western District" (Defs.' Mem. 1 (emphasis added)) defies common sense. At face value, the Defendants ask this Court to accept the assertion that none of the Richmond-based defendants (one of whom invented the Step-Down Program and another who was the warden of ROSP) have between them a single scrap of paper, email, or even draft document about (1) Step-Down, (2) the conditions of solitary at ROSP, (3) Mr. Reyes, (4) the grievance process at ROSP, (5) the work of the ERT, or (6) any of the other allegations in the Complaint centered on ROSP or Richmond. Plaintiff respectfully suggests that brief discovery on this assertion may well aid the Court's consideration of whether their bold assertion to the Court survives scrutiny. Regardless, the location of documents is not a significant factor favoring Defendants.[18]

CONCLUSION

The Plaintiff respectfully requests that the Defendants' Motion to Transfer Venue under 28 U.S.C. § 1404(a) be denied.

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[18] *Finkel v. Subaru of Am., Inc.*, Civil Action No. 3:06CV292, 2006 WL 2786811, at *3 (E.D. Va. Sept. 26, 2006) ("The comparatively low cost of transporting documents can make their location a less pressing consideration when deciding a motion to transfer venue.").

Dated: November 30, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of November, 2018, I electronically filed the foregoing Memorandum in Opposition to Defendants' Motion to Transfer Venue with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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